



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 195 OF 2024

. Shaikh Atiq Shaikh Khadar
Age: 29 years, Occu.: Labour,
R/o. Kranti Nagar, Parbhani,
Tq. & Dist.Parbhani.Appellant

Versus

1. The State of Maharashtra
2. X – VictimRespondents

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Advocate for Appellant : Mr. Sudarshan J. Salunke
APP for Respondent no.1 : Mr.N.D.Batule
Advocate for Respondent no.2 : Ms.J.R.Nawale (appointed)

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CORAM : ABHAY S. WAGHWASE, J.

**RESERVED ON : 02 AUGUST, 2024
PRONOUNCED ON : 19 AUGUST, 2024**

JUDGMENT :-

1. In this appeal exception has been taken to the judgment and order dated 29-01-2024 passed by learned Special Judge (POCSO Act), Parbhani in Special Case No.53 of 2020 recording conviction of the appellant for offence under Section 8 of the Protection of Children from Sexual Offences (POCSO) Act.

IN NUTSHELL PROSECUTION CASE

2. On 02-02-2020 victim, aged 6 years, accompanied her mother in the neighbourhood to see a new born being delivered to their acquaintance. Appellant, who happens to be cousin maternal uncle of victim, initially sent PW4 victim to purchase sachet of shampoo. When she returned with it, appellant dragged her inside the house, pulled down her Salwar and ejaculated on her person. Victim child went and reported the act of accused to her mother, who went and questioned accused and thereafter, reported the occurrence to PW7 Kendre (PSI), a Lady Police Officer, who took cognizance, penned down the report and registered crime. Investigation was carried out. Victim was subjected to medical examination. Accused was apprehended and he too was subjected to medical examination. Clothes of victim were seized and sent to the CA. Statement of relevant witnesses were recorded and after gathering evidence, accused came to be chargesheeted.

Learned Trial Judge conducted trial for commission of offence under Sections 376-AB of the Indian Penal Code (IPC) and Sections 6 and 8 of the POCSO Act.

On analyzing and appreciating the evidence, learned trial Judge concluded that prosecution established the case against

accused for commission of offence under Section 8 of the POCSO Act only and guilt and conviction came to be recorded accordingly by judgment and order dated 29-01-2024, precisely which is challenged in instant appeal.

SUBMISSIONS

On behalf of appellant :

3. Pleading innocence and false implication learned Counsel for the appellant would submit that there is no cogent, reliable and trustworthy evidence. Taking this Court through the evidence of victim, he would submit that infact here no sexual act has been committed as the victim merely deposed of urination. Learned Counsel would submit that there is neither touch nor penetration or insertion of any body part in any body part of the victim. Thus, according to him, there was no physical contact and on this count, he took this Court through the examination-in-chief of victim paragraph 3. According to him, the child was tutored to depose, and this is evident from the cross-examination of victim. He would strenuously submit that testimony of child witness cannot be relied or acted upon without sufficient corroboration as they are susceptible to tutoring and exaggeration.

4. Inviting attention of the Court to the FIR exh.60 filed by mother, it is submitted that there was no prompt reporting even when it was alleged to be case of sexual abuse. Therefore, according to him, such aspect is fatal for prosecution.

5. He also took this Court through the medical evidence and would submit that there is no finding about commission of any offence of sexual assault. He pointed out that clothes of victim were seized by investigating machinery, but after few days of the occurrence. That mother of victim admitted that victim was given bath and her clothes were also washed and therefore, he questions the so called semen stains appearing on clothes of victim. He also invited attention of the Court to the answers given by mother in paragraph 6 of the cross-examination, wherein informant admitted that she verified the clothes of victim after the incident and except wetness of pee, she did not notice anything. For all above reasons, he questions the prosecution version of semen stains detected on the leggings of the victim.

6. Learned Counsel, while defending the appellant, would further submit that surely this is not a case to attract charge under Section 8 of the POCSO Act. According to him, it is a case at the most

attracting charge under Section 11 and that the case would not travel beyond it. He pointed out that already accused had spent almost 13 months behind bars.

7. Lastly, he submitted that as essential ingredients for attracting Section 8 of the POCSO Act are patently missing, he questions the conclusion and findings reached at by learned trial Judge and prays to extend benefit of doubt as according to him, prosecution has failed to establish the charges beyond reasonable doubt.

In support of his submissions, learned Counsel for appellant relied on the judgment of the Hon'ble Supreme Court in the case of *Attorney General For India v. Satish and Another with connected matters*, (2022) 5 SCC 545.

On behalf of State :

8. Strongly resisting above appeal and submissions, learned APP would submit that victim, a barely 6 years old child, has been sexually abused by none other than her cousin maternal uncle. According to learned APP, sole testimony of child in this case being trustworthy, and credible, is rightly accepted by the trial Court. He submitted that immediately after the occurrence, victim reported to her mother, who went and questioned her own cousin brother and

even slapped him for the act. That occurrence is also reported to Police. Few days delay is because of reluctance to invite shame to the family which according to learned APP, usually happens in cases of such nature. That further here even accused was related to informant. That this might have contributed to little delay but further according to him, in cases of such nature, delay in lodging report is insignificant and it has been time and again reiterated by the Hon'ble Apex Court in numerous cases.

9. On the point of act of accused, learned APP would submit that admittedly there was no penetration of male organ or any part of the body, however, according to him, it needs to be appreciated that victim is barely 6 years of age and she has no understanding of body parts. That she being unaware of as to what is semen, might have used the word urination. That on the leggings of the victim, which were despatched for CA, semen stains were detected. Chemical Analyzer has detected it to be of 'B' blood group, which is the blood group of even accused, and therefore, according to learned APP, no further corroboration or evidence is required to hold act to be of none other than sexual assault. He also pointed out that the very act of stripping the victim of her garments, sexual intent of the accused is

explicit.

Consequently, he supports findings reached at by learned trial Judge regarding guilt recorded for offence under Section 8 of the POCSO Act.

In support of his submissions, learned APP relied on decision of Hon'ble Apex Court in *Ganesan v. State Represented by its Inspector of Police*, AIR 2020 SC 5019 and judgment of this Court passed in *Mohd. Khatir Shaikh alias v. State of Maharashtra and another in Criminal Appeal No.917 and 2022 with connected matters dated 07-02-2023*.

On behalf of Respondent no.2 / Victim :

10. Learned Counsel appointed to espouse the cause and protect interest of the victim would also submit that, victim has narrated the deeds of her own cousin maternal uncle to her mother immediately after the occurrence. That there was clear act of sexual abuse by the appellant. Even according to her, there is no reason to disbelieve testimony of victim as well as her mother and she would question why would there be false implication of close relative and that even there are no suggestions in that direction for namesake by the appellant in trial Court. Even she seeks reliance on CA report

confirming involvement of appellant. For all above reasons, she too prays to dismiss the appeal for want of merits.

EVIDENCE BEFORE TRIAL COURT

11. In support of its case, prosecution has examined in all seven witnesses in the trial Court. Sum and substance of their evidence is as under :

PW1 Ashok Narhari Savane, Pancha to spot panchanama exh.29.

PW2 Sandhya Dinkarrao Ippar, Head Mistress of primary school, who gave date of birth as per school record to be 27-12-2013 by placing exh.35, 36 on record.

PW3 Dr.Sandhyarani Narayan Doli, Medical Officer, who examined victim on 05-02-2020 at Civil Hospital Parbhani and issued certificate exh.38.

PW4 Victim testified that she knew appellant, who was her cousin maternal uncle and that while she was playing outside, he asked her to bring shampoo from shop and when she went to hand it

over to him, he dragged her in the house and passed urine on her person and she reported it to her mother.

PW5 Informant, mother of victim, deposed that incident took place on 03-02-2020 when she went to house of Shammo to attend the programme of child birth. At that time, her daughter came and reported that accused pulled her Salwar and urinated on her. So she enquired with him, slapped him in anger and about lodging report exh.61.

PW6 Ananta Kishanrao Soge, Counselor from ChildLine, who participated in the seizure panchanama exh.66 i.e. clothes of accused.

PW7 Supriya Subhashrao Kendre (PSI) Police Officer, who investigated crime and chargesheeted accused.

ANALYSIS

12. Upon trial, Special Judge (POCSO Act), Parbhani, held appellant guilty for offence under Section 8 of the POCSO Act. For proper comprehension, clarity and brevity, said provision is reproduced herein under :

“8. Punishment for sexual assault. - Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.”

As above provision provides for penal action for sexual assault, it would be also profitable to reproduce as to what is the import of phrase “sexual assault”.

“7. Sexual assault. - Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

13. Here evidence of **PW4** victim and her mother **PW5** informant is crucial and of much relevance and significance. Equally, is the Medical and scientific evidence and therefore, the same is put to careful sifting and analysis.

PW4 Victim deposed as under :

“1. I know Shaikh Atik. He is my cousin maternal uncle. An incident had taken place with me. I can not tell at what time and on which date it took place, however, it took place long back.

It took place in the house of Atik Mama. I was playing outside with my friend. We had been to the house of accused for seeing new born baby. My mother and grand mother were with me. Atik Mama (accused) sent me for bringing shampoo from the shop. I brought shampoo. When I was giving shampoo to him, he drag me in side the house holding my hand. He dragged my Salwar down and passed urine on my person. I went to my mother and disclosed what accused Atik Mama (accused) did with me. My mother went to accused and quarreled with him. Then my mother went to police station and reported the incident. I can identify Atik Mama, if shown to me. (victim is frightened and weeping, hence recording of her evidence is stopped for sometime. She was asked whether her mother could be called and she asked to call her mother. Hence, her mother is called. He father is already present in the court).

2. *After short time, her evidence is resumed. Accused is shown to the victim, she identified him as Atik Mama. I can not identify clothes which I was wearing at the time of incident). (the victim stated that the clothes may be shown to her. Hence, clothes are shown to her. She is unable to identify the clothes.) I had shown the house to police where the incident had taken place. My statement was recorded earlier before the Madam, in Court.*

3. *It did not happen that, Atik Mama, inserted his penis in my anus (the victim stated 'Nunnu'. It means penis in English). I had not stated so before police."*

PW5 Informant mother deposed as under :

1) *Victim-girl (J.F) PW-4 is my daughter. Her date of birth is 27/12/2013. At the time of incident, my daughter was aged about 06 years. My marriage took place in the year 2012. I know accused. He is my cousin brother.*

2) *Incident took place on 03/02/2020. On that day, I had been to the house of Shammo to see the programme of child. We went there to see new born baby. Their house is at Kranti Nagar, Parbhani. There we saw the baby and thereafter had been to the house of my elder maternal aunt which is adjacent to their house. At that time my daughter-J was playing outside. At that time accused gave call to my daughter for bringing shampoo. My daughter brought shampoo and gave it to accused. At that time accused pulled her hand. When I was going to home, at that time my daughter came behind me. At that time I inquired with her as to what happened. My daughter told that Atik mama pulled down her salwar and urinate there. Accused did that act when my daughter had been to him to give the shampoo pouch. When I heard about it, I was very angry. Therefore, I went to the house of accused and inquired with him as to why he did such act with my daughter and also slapped him in anger. Thereafter, I returned home. At that time all tried to convince me not to file any case as that would defame my daughter. However, I did not listen them and lodged report against accused in Kotwali Police Station.”*

14. Having noted **PW4** victim's account and **PW5** mother's testimony, it would also be desirable to see to what extent, their

above testimonies have remained intact and unshaken.

PW4, a child of barely 6 years of age, is subjected to extensive **cross-examination** and omissions are brought regarding accused asking her to bring shampoo from the shop and while giving it, accused holding her hand and dragging her inside. Thereafter, child complained of not feeling well and to be having nausea and therefore, further cross-examination was deferred. Examination-in-chief and first paragraph of cross-examination seems to be concluded on 15-03-2022. Record shows that after a gap of 8 months and 21 days further evidence was recorded. It is noticed that since then, the child has not supported prosecution as desired.

PW5 Mother also faced extensive **cross-examination**, but aspect of her daughter on that very day while she was returning from attending the said programme informing about the deeds of accused, has not been disturbed.

Thus what is emerging from substantive evidence of PW4 victim, she has categorically stated that when she brought shampoo and when she was giving it to appellant, he dragged her inside the house by catching her hands. He dragged her Salwar down and passed urine on her person and thereafter, since in

paragraph 2 of her examination-in-chief, which was resumed after a while, she has merely identified the accused and since then, she did not identify her own clothes and even denied that appellant inserted his penis in her anus.

PW5 her mother also stated that her daughter told that Atik Mama (appellant) pulled down her Salwar and urinated there.

Evidence of both PW4 and PW5 to the above extent has not been challenged and has thereby remained intact.

15. The three principal grounds of challenge are that, **firstly** victim supported defence in the cross-examination rather than supporting prosecution **secondly**, child was tutored and therefore, her testimony is unworthy of credence and **thirdly** there is no physical contact to accept prosecution version about sexual assault.

On minute scrutiny of the evidence of victim, it is noticed that her examination in chief was conducted on 15-03-2022. After narrating the incident in paragraph 1, she has complained of ill-health and deposed in paragraph 2 and 3 as reproduced above. It is pertinent to note that cross-examination commenced on 05-12-2022 i.e after gap of over nine months. Apparently, during such inordinate delay in cross-examination, tables were turned and it is obvious that

the child supported defence rather than prosecution and was resultantly won over. However, about the actual act, the child has stuck up and her version is finding support from her own mother to that extent.

16. As regards to the submission that the child did not support, it is fairly settled position that her entire testimony need not be discarded and so much part of her evidence, which is useful to the prosecution, can definitely be taken into consideration for evaluation. Law to this extent is time and again spelt out in numerous judgments. Reference to the few citations on which implicit reliance can be placed are as under :

“(a) ***Shyamlal Ghosh v. State of W.B.***, (2012) 7 SCC 646.

“Mere fact that two witnesses had turned hostile in present case would not affect prosecution case adversely. Moreover, even statements of these witnesses, who had turned hostile, partially supported case of prosecution.”

(b) ***Bable v. State of Chhattisgarh***, (2012) 11 SCC 181.

“Once registration of the FIR is proved by the Police and the same is accepted on record by the Court and the prosecution establishes its case beyond reasonable doubt

by other admissible, cogent and relevant evidence, it will be impermissible for the court to ignore the evidentiary value of the FIR. Herein, the FIR was duly proved by the statement of PW10 (SI). According to him, he had registered the FIR upon statement of PW1 and it was duly signed by him. The FIR was registered and duly formed part of the records of police station which were maintained in normal course of its business and investigation. In any case, the FIR by itself is not a substantive piece of evidence but it certainly is a relevant circumstances of evidence produced by the investigating agency. Merely because PW1 turned hostile, it cannot be said that the FIR would lose all its relevancy and cannot be looked into for any purpose.”

(c) ***Prem Singh v. State (NCT of Delhi)***, (2023) 3 SCC 372.

“such part of the evidence of a hostile witness which is found to be credible could be taken into consideration and it is not necessary to discard the entire evidence.

(d) ***Neeraj Dutta v. State (NCT of Delhi)***, (2023) 4 SCC 731.

“It is for the Judge as a matter of prudence to consider the extent of evidence which is creditworthy for the purpose of proof of the case. In other words, the fact that a witness has been declared “hostile” does not result

in an automatic rejection of his evidence. Even the evidence of a “hostile witness” if it finds corroboration from the facts of the case may be taken into account while judging the guilt of the accused. Thus, there is no legal bar to raise a conviction upon a “hostile witness” testimony if corroborated by other reliable evidence.”

Deriving strength from above precedent, here, so much part of the testimony of PW4 victim to which her mother has lent support can safely be relied.

17. The second objection about child witness testimony to be unworthy of credence in the light of possibility of tutoring, also has no much substance and merit. Time and again Courts are confronted with situations wherein there is child witness account also. On this count also law is loud and clear and dealt in umpteen judgments viz. ***Dattu Ramrao Sakhare and Others v. State of Maharashtra*** (1997) 5 SCC 341; ***Ratansinh Dalsukhbhai Nayak v. State of Gujarat*** (2004) 1 SCC 64; ***State of Madhya Pradesh v. Ramesh and Another***, (2011) 4 SCC 786, ***P. Ramesh v. State of Represented By Inspecor of Police***, (2019) 20 SCC 593.

The ratio that has been culled out in above rulings is that, cautious approach has to be adopted while appreciating child witness

account and Courts are expected to get itself ascertained that there is no element of tutoring. It is just a rule of caution and nothing beyond it. If the child witness account inspires confidence and is convincing, corroboration need not be insisted upon.

Very recently the Hon'ble Apex Court in the case of ***Ganesan v. State Represented By its Inspector of Police, (2020) 10 SCC 573*** and ***Rakesh @ Diwan v. State (GNCT of Delhi), 2021 SCC OnLine Del 3957*** specifically dealt with child witness account in POCSO cases, wherein it has been held that, the statement of prosecutrix, if found worthy of credence and reliable, requires no corroboration and the Court may convict the accused on the sole testimony of prosecutrix.

18. Having dealt above settled precedent, the objection of learned counsel for appellant that child witness account is unworthy of credence does not hold water. Here the child has promptly reported the act of accused with her to her mother, who also went and questioned accused. This Court is also more than convinced i.e. having carefully scrutinized child witness account, that there is no reason to hold that there was tutoring and so her evidence is unworthy of credence. The very aspect of she innocently deposing that accused urinated on her, itself goes to show that she was victimized. As stated above, her so much part of the evidence, need

not be doubted or discarded.

19. As regards to objection raised herein that there was no physical contact also loses its significance, for the reason that here semen stains were detected on her leggings. PW5 informant mother has deposed about noticing wetness. The situation and the mental set up in which the mother was after hearing the deeds, it is possible that she may not have noticed the wetness to be due to semen. Mother had occasion to notice wetness immediately after the occurrence, and it is common knowledge that, only when the semen gets dried up, it becomes prominent. Even mother answered in cross-examination that there was wetness.

Likewise, considering the tender age of the victim i.e. 6 years age, there is force in the submission of learned APP that, she was incapable of describing the very act in proper and clear terms. It is not expected from a girl of such tender age to give detail account and describe body parts. Consequently, she deposed in above manner describing the act as urination. She has categorically stated that accused had pulled down her leggings. Therefore, sexual intent of accused is explicit and manifest. In the considered opinion of this Court, when semen stains are detected on her leggings, there was ejaculation and not urination as is described by the child. His above

act itself constitutes sexual assault.

20. Much hue and cry is made by learned counsel for appellant on the point that clothes of the victim were not seized promptly and that mother had admitted about giving bath to the child and washing her clothes everyday. True it is that mother had, at subsequent point of time, handed over the clothes, but advance scientific analysis is potent enough to even pick up faint stains and analyze it. Here the fact that sample of accused was collected is not disputed or challenged. The blood group of accused and the semen stains on detection does reveal the same group and therefore, accused cannot escape by advancing above arguments. There is no explanation from his side, as to how his semen appeared on garments of the child. The very manner of cross-examination by defence, more particularly, in paragraph 6 clearly shows that visit of the child to the house of accused is admitted. Therefore, this amounts to acknowledging the act.

The facts in the case *Attorney General For India v. Satish and Another with connected matters* (supra) and the facts in the case in hand are quite distinguishable and hence, cannot be applicable to the case in hand.

SUMMATION

21. To sum up, here prosecution did succeed in bringing home the charge of commission of offence under Section 8 of the POCSO Act. Defence version that, it is not Section 8 of the POCSO Act but at the most Section 11 of the POCSO Act that could be attracted has no base or force. Learned trial Court has committed no error in accepting prosecution version to the above extent. No case being made out on merits, interference in any manner is uncalled for. Hence, appeal fails. Accordingly, following order is passed :

ORDER

(I) Criminal Appeal No.195 of 2024 stands dismissed.

(II) Fees of learned Counsel appointed for respondent no.2 is quantified @ Rs.10,000/-, to be paid through the High Court Legal Services Sub-Committee, Aurangabad.

(**ABHAY S. WAGHWASE**)
JUDGE